STATE OF MICHIGAN

COURT OF APPEALS

DEBORAH LYNNE OSTERMANN, Plaintiff-Appellee,	UNPUBLISHED September 22, 2005
V	No. 261271 Muskegon Circuit Court
ERNEST THEODORE OSTERMANN, Defendant-Appellant.	LC No. 01-014571-DM

Before: Smolenski, P.J., and Murphy and Davis, J.J.

PER CURIAM.

Defendant appeals by right from the trial court's judgment of divorce. We affirm everything except the property division, which we remand in part for clarification.

Defendant first argues that the trial court erred in failing to address his request for joint physical custody of the children and in its analysis of the child custody "best interest" factors. We disagree.

Because the parties agree that plaintiff has an established custodial environment, the burden of proof for changing the custodial environment is by clear and convincing evidence that such a change is in the best interests of the children. MCL 722.27(1)(c); *Schwiesow v Schwiesow*, 159 Mich App 548, 554; 406 NW2d 878 (1987). We review the trial court's findings of fact for clear error, but we review the ultimate custody decision for an abuse of discretion. *Thompson v Thompson*, 261 Mich App 353, 357-358; 683 NW2d 250 (2004). Custody disputes are to be resolved in the children's best interests, as measured by the factors set forth in MCL 722.23. *Eldred v Ziny*, 246 Mich App 142, 150; 631 NW2d 748 (2001). The trial court found in plaintiff's favor under factors (a), (b), (d), (e), (i), and (l). It found the parties equal under the remaining factors. The parties do not contest the trial court's findings under factors (f), (h), and (k). Ordinarily, we will reverse if the trial court fails to "consider and explicitly state its findings and conclusions with respect to each of these factors," but this is only necessary if as a result we lack "a complete factual record on which to impose the requisite evidentiary standard necessary to ensure that the trial court made a sound determination." *Foskett v Foskett*, 247 Mich App 1, 9-11; 634 NW2d 363 (2001).

MCL 722.23(a) and (b) concern "the love, affection, and other emotional ties existing between the parties involved and the child" and "the capacity and disposition of the parties involved to give the child love, affection, and guidance and to continue the education and raising

of the child in his or her religion or creed, if any," respectively. Defendant by his own admission acted irrationally when he came unannounced to see his children late in the evening during a rainstorm and briefly left some of his children's clothes strewn outside. He rarely saw his older children due to their refusal to see him. He had a physical altercation with one son and forcibly put him in a car to overcome the son's refusal to attend visitation time with his father. It was no stretch of the imagination for the court to consider these relations strained. Finally, even if defendant's contention that his wife acted against him to alienate his older children is true, it does not justify his reactive, impulsive behavior. There is evidence that defendant engaged in similar alienating behavior. Defendant's behavior and his strained relations with his older children belie his assertion that factors (a) and (b) should be scored equally or in his favor. The evidence does not clearly preponderate against plaintiff's favor under either factor.

MCL 722.23(c) concerns "the capacity and disposition of the parties involved to provide the child with food, clothing, medical care or other remedial care recognized and permitted under the laws of this state in place of medical care, and other material needs." The trial court found defendant capable but of dubious disposition, whereas it found plaintiff disposed but incapable. Defendant argues that plaintiff's counsel's statement during cross-examination complimenting defendant for always giving money to his family should overcome the trial court's finding of dubiousness. However, arguments of counsel are neither evidence nor stipulations of fact, *Zantop Int'l Airlines, Inc v Eastern Airlines*, 200 Mich App 344, 364; 503 NW2d 915 (1993), and this was not the kind of "distinct, formal, solemn admission made for the express purpose of, *inter alia*, dispensing with the formal proof of some fact at trial." *Ortega v Lenderink*, 382 Mich 218, 222-223; 169 NW2d 470 (1969) (emphasis in original). The lower court record shows, among other things, that the trial court had to threaten defendant with contempt of court unless he complied with temporary spousal support orders. To the extent that refusal to provide spousal support impacts the material well-being of the children, the court's finding is relevant to factor (c). A finding of equality under this factor is not against the great weight of the evidence.

MCL 722.23(d) and (e) concern "the length of time the child has lived in a stable, satisfactory environment, and the desirability of maintaining continuity" and "the permanence, as a family unit, of the existing or proposed custodial home or homes," respectively. Defendant conceded that plaintiff has an established custodial environment, and he testified that he and his fiancée lacked settled or certain plans for their home life. Defendant urges us to consider the effect plaintiff's parental alienation might have on the home environment, but does not explain what that effect might be. The testimony established that plaintiff had given the children a stable and satisfactory environment for a number of years. We do not find the record insufficient, *Foskett, supra* at 11, and the evidence does not clearly preponderate against the trial court's conclusion under factor (d). Defendant also urges us to conclude that he would have provided stability for the children if the trial court had awarded him additional parenting time, but such a conclusion would be speculative. For the same reasons supporting factor (d), the evidence does not clearly preponderate against the trial court's conclusion under factor (e).

MCL 722.23(g) concerns "the mental and physical health of the parties involved." Defendant argues that this factor should have favored him solely because plaintiff's parental alienation "suggests mental health counseling is necessary." Defendant engaged in parental alienation as well, albeit to a lesser degree. The expert psychologist who testified below, and who pointed out plaintiff's parental alienation, found no evidence of significant mental problems

in either party, and we see no evidence in the record suggesting otherwise. Defendant does not raise any physical health issues for our consideration.

MCL 722.23(i) concerns "the reasonable preference of the child, if the court considers the child to be of sufficient age to express preference." The court interviewed the children and found that their preferences were for plaintiff. The court did not elaborate, which is proper. In determining the preferences of the children, the trial court can interview the child in camera and exclude the child's testimony at trial. *Impullitti v Impullitti*, 163 Mich App 507, 510; 415 NW2d 261 (1987). Defendant's contention that the court should consider the children's preferences in light of plaintiff's parental alienation does not persuade us that the court's finding was against the great weight of the evidence.

MCL 722.23(j) concerns "the willingness and ability of each of the parties to facilitate and encourage a close and continuing parent-child relationship between the child and the other parent or the child and the parents." The psychologist's report indicated that defendant apparently engaged in "mild" alienation whereas plaintiff engaged in "moderate" alienation. This supports the conclusion that both parents engaged in the same kind of behavior. The trial court explicitly discounted another doctor's testimony indicating that this factor favored defendant, noting that the evidence also showed that defendant had attempted "to curry favor with the children at Plaintiff's expense." We defer to the trial court's determination of credibility. *Mogle v Scriver*, 241 Mich App 192, 201; 614 NW2d 696 (2000). The evidence shows that both parties engaged in at least some behavior intended to undermine the other, and it does not clearly preponderate against a finding of equivalence under this factor.

MCL 722.22(l) concerns "any other factor considered by the court to be relevant to a particular child custody dispute." The trial court noted that the three oldest children wanted little to do with defendant, which is a conclusion supported by the evidence, not the least of which was testimony that defendant had to put his twelve-year-old son in a headlock and forcibly put him in the car for visitation time with defendant. Defendant argues that they want little to do with him because of plaintiff's machinations, but irrespective of why the children want little to do with defendant, the trial court did not clearly err in finding the fact to exist and to be relevant to the custody dispute.

Defendant argues that the trial court made insufficient findings of fact when it rejected a joint custody award. MCL 722.26a requires the trial court to consider joint custody on the basis of the best interest factors at the request of either parent. The trial court did so here, unlike the situation in *Arndt v Kasem*, 156 Mich App 706, 709; 402 NW2d 77 (1986), where the "bench opinion [was] devoid of any consideration of the best-interest factors." Consideration of defendant's request for joint physical custody is inherent in the consideration of the best interest factors. The court's findings under the best interest factors supported an award of primary physical custody award to plaintiff.[1]

Defendant next challenges the court's award of spousal support. We affirm it.

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[1] The trial court awarded joint legal custody pursuant to the parties' request.

The main objective of alimony is to balance the incomes and needs of the parties in a way which will not impoverish either party, and alimony is to be based on what is just and reasonable under the circumstances of the case. *Moore, supra* at 654. The ultimate award is discretionary with the trial court, *Gates v Gates*, 256 Mich App 420, 432; 664 NW2d 231 (2003), and we will affirm unless we are "left with the firm conviction that the [award] was inequitable." *Sparks v Sparks*, 440 Mich 141, 151-152; 485 NW2d 893 (1992). The court considered several factors pursuant to *Olson v Olson*, 256 Mich App 619, 631; 671 NW2d 64 (2003). The parties do not challenge factors 5 or 6.

Under factor 1, the past relations and conduct of the parties, *Olson, supra* at 631, the court found that plaintiff was favored because defendant was forced to appear for hearings to compel him under threat of contempt of court to comply with temporary spousal support orders. Defendant contends that the trial court wrongly based its finding on fault and cites transcript testimony indicating that plaintiff was not alleging fault. However, that was actually a reference to not using fault for property division. We see no clear error in the trial court's decision to consider, for the purpose of the final order, how defendant treated his obligations toward plaintiff under the temporary orders for spousal support.

Under factor 2, the length of the marriage, *Olson, supra* at 631, the court found that the length of marriage favored plaintiff because the parties were married for almost thirteen years. Defendant argues that the marriage was not long-term. We do not see any clear error in the trial court's determination that thirteen years was sufficiently long to favor plaintiff, especially in light of the five children they had together, which they agreed plaintiff would raise.

Under factor 3, the ability to work, *Olson, supra* at 631, the court found in favor of plaintiff, noting that she had not worked for twenty-four years, her relatively low level of education, and the fact that defendant is a shareholder in a multimillion dollar corporation. The evidence shows that plaintiff actually had not worked for sixteen years and obtained a year of college education. However, these errors are insignificant. Plaintiff's absence from the workplace, level of education, and child-raising obligations pursuant to the parties' agreement show that the trial court did not clearly err in finding this factor in plaintiff's favor.

Under factor 4, the source and amount of property awarded to the parties, *id.*, the court found in favor of plaintiff, noting defendant's substantial salary and income producing-property. In contrast, plaintiff received property ostensibly with a higher value, but it was largely not income-producing. A party should not ordinarily be expected to "'consume her capital to support herself." *Olson, supra* at 633, quoting *Hanaway v Hanaway*, 208 Mich App 278, 296; 527 NW2d 792 (1995). We do not perceive any clear error in finding this factor in plaintiff's favor.

The court combined factors 7 and 8, the parties' present situation and their needs, and found in favor of plaintiff. *Olson, supra* at 631. Defendant argues only that we "should award a reasonable alimony amount for a short term of years" based on plaintiff's ability to work and the child support and property awards. In light of defendant's relative income and employment capacity, we do not find the trial court's factual finding in plaintiff's favor clearly erroneous.

The court scored factor 9, the health of the parties, *Olson, supra* at 631, in favor of plaintiff because she has Hodgkin's disease in remission and that it "will forever be a factor

deserving of cautious consideration." This apparently does not constitute a medical problem preventing her from working, but the fact that she has this disease was uncontested below, and defendant presented no indication that he had any health problems. The trial court did not clearly err in favoring plaintiff under this factor.

Factor 10 measures the prior standard of living of the parties and whether either is responsible for the support of others. *Olson, supra* at 631. As noted, plaintiff received little income-producing property, and the child support payments are for the children. We perceive no error in the trial court's conclusion that plaintiff will not be able to maintain her present standard of living without assistance from defendant.

Factor 11 considers general principles of equity. *Olson, supra* at 631. The court found that the parties married in 1988 and plaintiff's job became raising the children while defendant was to provide financially for the family. "Implicit in that arrangement was that Plaintiff would be provided for in the manner expected of the wife of a highly compensated professional." The court further found that "[e]quity dictates that this agreement be honored." We agree. Plaintiff has not finished raising the children. Therefore defendant should continue to support the family economically.

On the basis of all the above factors, the court awarded $113,500 a year, one quarter of defendant's average salary, for thirteen years, or until the youngest child attained twenty-one years of age. The amount of the award is commensurate with defendant's ability to pay and plaintiff's standard of living, present needs, and difficulty in earning her own income. The length of the award corresponds to the parties' agreement at the outset of the marriage for defendant to earn money while plaintiff raised the children. We are not convinced that the award was inequitable, so we affirm it.[2]

Defendant contends that the court erred in calculating child support according to his full-time average income as opposed to the reduced schedule he was working at the time of trial. Child support awards are discretionary and presumed to be correct. *Morrison v Richerson*, 198 Mich App 202, 211; 497 NW2d 506 (1992). When assessing a parent's ability to pay support, the trial court is not limited to consideration of a parent's actual income. *Reed v Reed*, 265 Mich App 131, 163; 693 NW2d 825 (2005). Rather, it may consider the parent's voluntarily

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[2] Defendant also complains that the trial court did not specify whether the award is periodic or in gross for the purpose of post-judgment proceedings. See *Van Houten v Van Houten*, 159 Mich App 713, 716; 407 NW2d 69 (1987). Defendant is apparently concerned with the manner of enforcement: whether alimony must be enforced "by plaintiff in an action at law" or "through the continuing jurisdiction of the court in the original divorce action." *Id*. This is not a concern, because MCL 552.28 "creates a statutory right in either party to seek modification of alimony" and "will always apply to any alimony arrangement adjudicated by the trial court when the parties are unable to reach their own agreement." *Staple v Staple*, 241 Mich App 562, 568-569; 616 NW2d 219 (2000). The alimony arrangement here was adjudicated by the trial court, so enforcement would be through the trial court's continuing jurisdiction. The trial court ordered the spousal support taxable to plaintiff and tax-deductible to defendant.

unexercised ability to earn, *Ghidotti v Barber*, 459 Mich 189, 198; 586 NW2d 883 (1998). Defendant elected to reduce his work schedule two years after the separation and more than a year after plaintiff filed this divorce action, and he has not provided any showing that he is unable to return to his original schedule. Furthermore, his actual salary is sufficient to pay child support calculated according to his earning potential. The trial court did not abuse its discretion.

Defendant also challenges the court's award of attorney fees to plaintiff. The trial court has discretion to award attorney fees as are necessary and reasonable. *Thames v Thames*, 191 Mich App 299, 310; 477 NW2d 496 (1991). The trial court did not explicitly justify its award, but the record establishes that plaintiff was unable to pay her attorney and that defendant did have the ability to pay. Defendant does not challenge the amount of attorney fees as unreasonable and in fact previously paid $10,000 of plaintiff's attorney fees. The trial court's opinion supports it conclusion that the award of attorney fees was appropriate because of plaintiff's financial need. See, e.g., *Kurz v Kurz*, 178 Mich App 284, 298; 443 NW2d 782 (1989). The court did not abuse its discretion in awarding plaintiff an additional $25,000 in attorney fees.

Finally, defendant objects to the trial court's division of the marital property. We review the trial court's findings of fact for clear error and then determine "whether the dispositional ruling was fair and equitable in light of the facts." *Olson*, *supra* at 622. The trial court is obligated to divide the property on the basis of a number of equitable factors: "(1) duration of the marriage, (2) contributions of the parties to the marital estate, (3) age of the parties, (4) health of the parties, (5) life status of the parties, (6) necessities and circumstances of the parties, (7) earning abilities of the parties, (8) past relations and conduct of the parties, and (9) general principles of equity," although the trial court may also consider other factors where appropriate. *Sparks*, *supra* at 159-160. However, the ultimate dispositional ruling is discretionary and will only be reversed if we are left with the firm conviction that it was inequitable. *Sands v Sands*, 442 Mich 30, 34; 497 NW2d 493 (1993).

Defendant argues that because a substantial portion of his property was purchased after the parties separated, it should have been divided differently or not have been included. We disagree that it should not have been included as a marital asset.

Generally, marital assets are subject to division between the parties, but the parties' separate assets may not be invaded. *McNamara v Horner*, 249 Mich App 177, 183; 642 NW2d 385 (2002). The parties' manifestation of intent to lead separate lives, such as by filing a complaint for divorce or maintaining separate homes, may be of crucial significance when apportioning the marital estate. *Byington v Byington*, 224 Mich App 103, 112; 568 NW2d 141 (1997). However, property earned after such a manifestation of intent should still be considered a marital asset, although the presumption of congruence that exists with respect to the distribution of marital assets becomes attenuated and may result in the nonacquiring spouse being entitled to no share or a lesser share of the property in light of all the apportionment factors. *Id.* at 115-116. Defendant's contention that the assets he acquired between the separation and the divorce should not be considered marital assets fails as a matter of law.

Defendant argues that the property distribution was erroneous because the trial court failed to make required findings of fact. We agree.

If the value of an asset is in dispute, the court must specifically determine its value. *Olson*, *supra* at 627. Findings are sufficient if the parties can "determine the approximate respective values of their individual awards by consulting the verdict along with the valuations to which they stipulated." *Nalevayko v Nalevayko*, 198 Mich App 163, 164; 497 NW2d 533 (1993). We do not find the record here to be sufficient for that purpose as to the items that the parties have not stipulated to. The "courts must uphold divorce property settlements reached through negotiation and agreement of the parties." *Quade v Quade*, 238 Mich App 222, 226; 604 NW2d 778 (1999). The trial court did not place on the record what values it placed on the disputed property items or what percentage proportion of the final estate was to be awarded to the parties. The court appears to have adopted plaintiff's proposed division of the marital assets but did not explicitly say so. The court also did not rule on what property was or was not included in the marital estate. Finally, the court did not determine the dollar value of the assets not agreed upon by the parties.

We therefore vacate the property division to the extent it has not been stipulated to. We remand for the necessary factual determinations and valuations to effectuate a division of the marital assets.

Affirmed in all other respects. We do not retain jurisdiction.

/s/ Michael R. Smolenski
/s/ William B. Murphy
/s/ Alton T. Davis